Ethical and Risk-management Issues in Behavioral Health

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Evolution of Ethics in the Human Services

• Morality period (late 19th century to early 20th century)
• Values period (early 20th century to 1970s)
• Ethical dilemmas and decision-making period (late 1970s to present)
• Ethics risk-management period (early 1990s to present)
• Digital period (2010-ish to present)

Core Knowledge

• Ethical dilemmas: Conflicts among competing obligations and duties
• Ethical decision-making: How we approach making challenging ethical decisions
• Ethics risk management: Taking practical steps to
  — Protect clients
  — Prevent lawsuits (litigation)
  — Prevent ethics complaints
**Potential Ethics Risks**

- **Ethical mistakes**: Inadvertent errors (otherwise known as *Oops!*)
- **Deliberate ethical decisions**: Making ethical decisions in a way that is designed to protect clients, practitioners, employers, and other parties
- **Ethical misconduct**: Violations of prevailing ethical standards

**Key Risk Areas**

- Client rights
- Confidentiality and privacy
- Informed consent
- Service delivery
- Boundary issues and conflicts of interest
- Digital and social media
- Documentation
- Defamation of character
- Client records
- Supervision
- Staff development and training
- Consultation
- Client referral
- Fraud
- Termination of services and client abandonment
- Practitioner impairment
- Evaluation and research

**Standard of Care**

“What a *reasonable* and *prudent* professional, with the same or similar training, would have done under the same or similar circumstances.”
Standards of Care

• Substantive standard of care
• Procedural standard of care (see Reamer, 2015)
  – Consult colleagues and supervisors
  – Review relevant ethical standards
  – Review relevant laws, policies, and regulations
  – Review relevant practice standards
  – Review relevant literature
  – Obtain legal consultation, when necessary
  – Consult ethics committee, if available
  – Document decision-making steps

Types of Laws

• Regulatory law (executive branch)
• Statutory law (legislative branch)
• Case law (judicial branch)
• Constitutional law

Professional Negligence

• A duty exists
• Dereliction or breach of the duty
• Damage or injury
• Causal connection between the breach of the duty and the damage or injury (proximate cause or “cause in fact.”)
Forms of Negligence

- **Misfeasance**: Commission of a proper act in a wrongful or injurious manner or the improper performance of an act that might have been performed lawfully.
- **Malfeasance**: Commission of a wrongful or unlawful act.
- **Nonfeasance**: The failure to perform an act that is part of one’s responsibility.

Intentional Disclosure

- Duty to protect/warn
- Mandatory reporting
- 42 CFR Part II
- FERPA: Family Education Rights & Privacy Act
- HIPAA: Health Insurance Portability and Accountability Act
- Disclosure: Other agencies
- Disclosure: Within agencies
- Peer Consultation
- Group counseling
- Self-help groups
- Minors
- Bill collection
- Deceased clients
- Sexual misconduct by professionals
- News media
- Law enforcement
- Interns
- Personal notes

Unintentional Disclosure

- Waiting rooms
- Hallways
- Desk
- Office phone
- Office notes
- Elevators
- Restaurants
- Photocopies
- Cellular telephones
- Fax and voicemail
- Internet Communications
- Computer Screen
- Envelope return address
- Bus, Train, Plane
**Duty to Protect**

- Threat of violence
- Foreseeable threat
- Imminent threat
- Identifiable potential victim

**Informed Consent**

- Voluntary and informed
- Content of Form
- Process

**Content of Form**

- Detailed statement of purpose
- Right to refuse and Withdraw
- Reasonable alternatives
- Costs/Benefits
- Jargon
- Blank forms
- Exceptions: Emergency, Therapeutic privilege, client waiver
- Expiration date
- Acknowledgment statement
Process

• Competence
• Verbal explanation
• Opportunity for Q&A
• Language barriers

Defamation of Character

• Libel (written) and slander (verbal)
• Key elements
  – Untrue statements
  – Knowingly untrue or should have known to be untrue
  – Damage or injury

Subpoenas

• Subpoena duces tecum; Subpoena ad testificandum
• Possible responses:
  – Motion to quash
  – Motion for protective order
  – Request for finding of relevance (“in camera” review)
  – Request to modify subpoena
  – Object to subpoena
Negligent Intervention

• High-risk techniques
• Inadequate training or expertise

Boundary Issues

• Types of dual or multiple relationships
  ◦ Intimate relationships
  ◦ Personal benefit
  ◦ Emotional and dependency needs
  ◦ Altruism
  ◦ Unavoidable and unanticipated circumstances
• “Red Flags”
  ◦ Objectifying client
  ◦ Impulsive actions
  ◦ Self-gratification

Supervision

• Key concepts: *Respondeat Superior* and vicarious liability
• Key elements:
  – Content of supervision
  – Frequency of supervision
  – Duration of supervision
  – Boundaries between supervisor and supervisee
• Documentation
Termination of Services

• The concept of abandonment
• Guidelines to protect clients and minimize risk

Guidelines to Protect Clients and Minimize Risk

• Provide clients with names, addresses, and telephone numbers of at least 3 appropriate referrals when it is necessary to terminate.
• Follow up with a client who has been terminated. If the client does not go to the referral, write a letter to him or her about relevant risks.
• Provide as much advance warning as possible
• When clients announce their decision to terminate prematurely, explain risks involved and suggestions for alternative care. Include this information in a follow-up letter.

Guidelines to Protect Clients and Minimize Risk (cont’d)

• Carefully document in the case record all decisions and actions related to termination.
• In cases involving discharge from residential facilities, prepare a comprehensive discharge plan and notify significant others (inform clients of this.)
• Provide clients with clear instructions to follow in the event of an emergency. Ask clients to sign a copy acknowledging receipt and that the instructions were explained to them.
Guidelines to Protect Clients and Minimize Risk (cont’d)

- When leaving an employment setting, inform clients of appropriate options for continuation of services (e.g., transfer or continuation) and related benefits and risks.
- Consult with colleagues and supervisors about termination strategy and decisions.
- Consult relevant Code of Ethics standards.

Documentation: Key Issues

- The role of documentation and case recording in professional practice
  - Assessment
  - Planning and delivering services
  - Accountability: Clients, insurers, agencies, other providers, courts, utilization review
  - Continuity and coordination of services
  - Supervision
  - Evaluation of services

Documentation Guidelines

- Content of documentation: Key elements
- Amount: Too little, too much
- Wording: Precision, specificity, and ambiguity
- Defamation of character
- Avoid abbreviations unless approved list
- Print or write legibly
- Do not use dittos, erasures, or “white out”
- Do not document interventions before they occur
- Document in a timely fashion
Documentation Guidelines (cont’d)

• Do not display bias
• Avoid “It seems,” “I believe,” “I suppose,” “it appears,”
• Avoid broad characterizations: “poor outcome,” “good result,” “moderate compliance,” “drunk,” “aggressive,” “combative”
• Document what you know, not what you think
• Do not “over document” in a crisis
• Avoid documenting professional disagreements (jousting)

Documentation Guidelines (cont’d)

• Do not document staffing problems, interdepartmental issues
• Do not tamper with or alter records
• Use correct grammar and spelling (credibility issue)
• Client access to records
• Confidentiality and releases
• Privileged communication
• Personal notes
• Subpoenas

Ethics Committees

• Advisory v. Deliberative
• Functions
  – Case Consultation
    • Retrospective
    • Concurrent
    • Prospective
  – Policy review and formulation
  – Education and training
**Ethical Decision-making**

- Identify ethical issues: Conflicting values and duties.
- Identify individuals, groups, organizations likely to be affected by decision.
- Tentatively identify all possible courses of action and participants involved in each, along with possible benefits and risks.

**Ethical Decision-making (cont’d)**

- Examine reasons for and against each possible course of action, considering:
  - Ethical theories, principles, guidelines
  - Codes of ethics
  - Practice standards in the profession
  - Legal principles
  - Social work practice theory and principle
  - Personal values (religious, cultural, ethnic, political)
  - Agency policies, regulations

**Ethical Decision-making (cont’d)**

- Consult with colleagues and appropriate experts (e.g., agency staff, supervisors, administrators, attorneys, ethics experts)
- Make decision and document decision-making process
- Monitor, evaluate and document decisions
Recognizing Ethical Dilemmas:
The Nature of “Inattentional Blindness”

http://www.npr.org/2011/06/20/137086464/why-seeing-the-unexpected-is-often-not-believing

This presentation draws on: